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September 15, 2006

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: March 15, 2006

Case Number: TSO-0366

This decision concerns the eligibility of XXXXXXXXXXXX (hereinafter "the Individual") for continued access authorization. This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the Individual's suspended access authorization should be restored. For the reasons detailed below, it is my decision that the Individual's access authorization should not be restored at this time.

I. APPLICABLE REGULATIONS

The regulations governing the Individual's eligibility are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material."

An individual is eligible for access authorization if such authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). "Any doubt as to an individual's access authorization eligibility shall be resolved in favor of the national security." *Id. See generally Dept. of the Navy v. Egan*, 484 U.S. 518, 531 (1988) (the "clearly consistent with the interests of national security" test indicates that "security-clearance determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990) (strong presumption against the issuance of a security clearance). Thus, the standard for eligibility for a clearance differs from the standard applicable to criminal proceedings in which the prosecutor has the burden of proof.

If a question concerning an individual's eligibility for a clearance cannot be resolved, the matter is referred to administrative review. 10 C.F.R. § 710.9. The individual has the option of obtaining a decision by the manager at the site based on the existing information or appearing before a hearing officer. *Id.* § 710.21(3). Again, the burden is on the individual to present testimony or evidence that he is eligible for access authorization, i.e., that access authorization will not endanger the common defense and security and will be clearly consistent with the national interest." *Id.* § 710.27(a).

II. BACKGROUND

The Individual has been employed at a DOE facility in a position that requires her to hold an access authorization. In September 2005, the Individual tested positive for marijuana in a random drug screen.

In October 2005, the Individual was the subject of a personnel security interview (PSI). During the PSI, the Individual confirmed that she smoked marijuana on three separate occasions in late August 2005 and early September 2005.

In January 2006, the DOE notified the Individual that the results of the September 2005 random drug screen and the information disclosed during the October 2005 PSI constituted derogatory information that created a substantial doubt as to the Individual's continued eligibility for an access authorization under 10 C.F.R. § 710.8(k) and (l) (Criteria K and L). Notification Letter, January 31, 2006. Upon receipt of the Notification Letter, the Individual requested a hearing in this matter. *See* Individual's Letter, February 17, 2006. The DOE forwarded the request to the Office of Hearings and Appeals (OHA). The OHA Director appointed me to serve as the hearing officer.

The Individual did not dispute that the foregoing facts give rise to the Criteria K and L concerns cited in the Notification Letter. Rather the Individual maintained that her marijuana use was an isolated incident. The Individual stated that she regretted the incident and it would never happen again.

A hearing was held in this matter. Both the Individual and the DOE counsel submitted documents. At the hearing, the Individual represented herself and presented her own testimony as well as the testimony of several witnesses at the hearing to corroborate her position that the marijuana use was an isolated incident and that she is honest, reliable, and trustworthy. The DOE counsel also questioned those witnesses, eliciting testimony intended to emphasize the serious nature of the security concerns at issue, as well as eliciting testimony relevant to the Individual's mitigation arguments. The DOE counsel did not present any witnesses.

III. THE HEARING

In addition to the Individual, four witnesses testified at the hearing. The witnesses were the Individual's husband, two friends of the Individual, and the Individual's co-worker.

A. The Individual

The Individual testified about her 2005 marijuana use. The Individual attributed her use of the substance to her desire to see if smoking marijuana would ease recurring pain she suffered as a result of a prior severe back injury. She stated she takes various steps to ease her pain. For example, the Individual stated that when she knows she will be engaging in physical activity, she wears a back supporter. Transcript ("Tr.") at 21. The Individual described the circumstances surrounding her possession of the marijuana as follows:

I was coming back from the park...there is this curve, and these kids – and I had seen them before, they were kind of trying to get across the street, a busy street, and they dropped [the marijuana], and I picked it up and hollered their name. Of course, they didn't turn around and – they didn't turn around to acknowledge, and I called their name again – or I just hollered for them, I didn't know their names – and so I picked it up, and that was it.

Tr. at 64-65. The Individual stated that she recognized the substance as marijuana. Tr. at 66. According to the Individual, she found the marijuana in late 2004 and did not smoke it for the first time until late August 2005. Tr. at 64. The Individual stated that she smoked the marijuana three times on “the last Saturday or Sunday in August [2005], and those two days, Labor Day weekend, and that was it.” *Id.* When asked why she chose to smoke the marijuana the first time, the Individual stated that she had “just kind of done some physical outside work...and I just kind of thought I would see if it was as relaxing as they said.” Tr. at 27. The Individual stated that she did not tell anyone, including her husband, that she smoked the marijuana. Tr. at 57.

The Individual stated that she accepted responsibility for her actions and that she would never use an illegal substance again. Tr. at 58. She stated that she does not believe it is acceptable to smoke marijuana and that she was ashamed of her actions. Tr. at 61. She added, “I like my job. [The marijuana use] had nothing to do with my reliability and my honesty at work. It was a one-time thing, and I don't think it's okay, and it won't ever happen again.” *Id.* When asked what she would do if her back pain intensified again, the Individual stated that she had set limitations and that she would not overexert herself. She also stated that she now wears her back brace more often. *Id.* The Individual stated that if her back pain worsened, she “would never even consider” smoking marijuana again. Tr. at 71. The Individual admitted that she was aware of the drug policies of her employer and DOE, but stated that she did not consider reporting her use of the marijuana between the first and second time she smoked it. Tr. at 67. The Individual stated that she was not subject to blackmail over her use of marijuana. Tr. at 82.

B. The Individual's Spouse

The Individual's spouse stated that the Individual had been under a significant amount of stress due to both his mother and her mother being ill. Tr. at 8. He stated that the Individual did not tell him about her marijuana use until after she tested positive for the substance in the random drug screen. Tr. at 9. When asked what the Individual told him about her marijuana use, the Individual's spouse stated, “[s]he said she was walking the dog and found it. I believe her. I have no reason not to...we've always been honest with each other...she said she just decided – I guess decided to try it. A lot of people do it, and – but her back was bothering her.” Tr. at 10. The Individual's spouse stated that the Individual “got curious about it and wanted to know if that would help her back.” Tr. at 11. He stated that the Individual told him that “[the marijuana] kind of calmed her, and she said it did kind of ease the pain a little, but that...was it.” Tr. at 20.

The Individual's spouse stated that he believed his wife was honest, reliable and trustworthy and that she used good judgment despite her marijuana use. Tr. at 15-16. He stated that he did not believe that the Individual's use of a small amount of marijuana meant she posed a threat to the

national security. Tr. at 16. The Individual's spouse stated that the Individual "did it once, she tried it, and it's over. She swore she'd never do it. I take her for her word." Tr. at 18.

C. The Individual's Friends

Friend No. 1 stated that she had known the Individual since the ninth grade and that they often socialized together outside of work. Tr. at 36. She stated that the Individual told her she smoked the marijuana because her back hurt. Tr. at 38. Friend No. 1 stated that she was surprised the Individual smoked the marijuana because she had never known the Individual to use any illegal substances and that it was "uncharacteristic" of the Individual. Tr. at 38-39. Friend No. 1 stated that she believed the Individual to be honest, reliable and trustworthy, despite her use of the marijuana. Tr. at 44.

Friend No. 2 stated that he was acquainted with the Individual through work and because she was a neighbor. Tr. at 47. He stated that he was "flabbergasted" about the Individual's use of marijuana. Tr. at 51. Friend No. 2 stated that he believed the Individual was a good employee, adding, "she has always, to my knowledge, done above and beyond what was asked of her, although I don't work directly with [her]." Tr. at 52. Friend No. 2 stated that he was aware that drug use while holding a clearance was prohibited, but he did not think the Individual's use of marijuana affected her honesty, reliability and judgment. Tr. at 49. He also stated that he believed the Individual's use of marijuana was an isolated incident and that he did not believe she could be blackmailed or coerced because of it. Tr. at 53, 50. Friend No. 2 stated that he did not know whether the Individual would have disclosed her marijuana use had she not tested positive in the random drug screen. Tr. at 53.

D. The Individual's Co-Worker

The Individual's co-worker stated that he has known the Individual for approximately 18 years. Tr. at 75. He described the Individual as "a very conscientious employee" who "does excellent work." Tr. at 76. The co-worker stated that the Individual told him she smoked marijuana in an effort to alleviate her back pain. Tr. at 77. He also expressed why he believed that the Individual was not a security risk:

I'm sure that it was a one-time situation. We all make mistakes, and I'm assuming that was a mistake that she made. She's conscientious, extremely conscientious, very much aware of rules and this type of thing. That's why it was somewhat out of character. She takes need to know very seriously, and I would assume that that would continue.

Tr. at 77-78. He stated that the Individual "probably" would have disclosed her marijuana use in the next reinvestigation of her security clearance. *Id.*

IV. STANDARD OF REVIEW

Under Part 710, the DOE may suspend an individual's access authorization where "information is received that raises a question concerning an individual's continued access authorization eligibility." 10 C.F.R. § 710.10(a). After such derogatory information has been received and a question concerning an individual's eligibility to hold an access authorization has been raised, the burden shifts to the individual to prove that "the grant or restoration of access authorization to the Individual would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.27(a).

Derogatory information includes, but is not limited to, the information specified in the regulations. 10 C.F.R. § 710.8. In considering derogatory information, the DOE considers various factors including the nature of the conduct at issue, the frequency or recency of the conduct, the absence or presence of reformation or rehabilitation, and the impact of the foregoing on the relevant security concerns. *Id.* § 710.7(c). The ultimate decision concerning eligibility is a comprehensive, common sense judgment based on a consideration of all relevant information, favorable and unfavorable. *Id.* § 710.7(a).

V. ANALYSIS

As mentioned above, it is undisputed that the Individual smoked marijuana three times in late August and early September 2005. The DOE became aware of the marijuana use when the Individual tested positive for marijuana in a random drug screen at her place of employment. It is beyond dispute that use of illegal drugs raises security concerns. *See* 66 Fed. Reg. 47069 ("Adjudicative Guidelines Approved by the President in Accordance with the Provisions of Executive Order 12968") ("Drug abuse or dependency may impair social or occupational functioning, increasing the risk of an unauthorized disclosure of classified information."); *Personnel Security Hearing, Case No. VSO-0113*, 25 DOE ¶ 85,512 (1995) ("The drug user puts his own judgment above the requirements of the laws, by picking and choosing which laws he will obey or not obey. It is further the concern of the DOE that the drug abuser might pick and choose which DOE security regulations he will obey or not obey with respect to protection of classified information."). Furthermore, drug use calls into question the user's judgment and reliability. *See, e.g., Personnel Security Hearing, Case No. VSO-0023*, 25 DOE ¶ 82,761 (1995) (stating that "any drug usage while the individual possesses a [security] clearance and is aware of the DOE's policy of absolute abstention demonstrates poor judgment."). Therefore, the only issue remaining is whether these serious security concerns have been mitigated. For the reasons set forth below, I find that the Individual has not resolved the security concerns.

As an initial matter, I question the Individual's explanation of how she came to possess the marijuana – that she found the marijuana in a park. I am skeptical of the Individual's testimony that she saw a group of boys drop the marijuana in the park and, being curious, picked up the marijuana and brought it home with her where she kept it for several months before smoking it. This leads me to question generally the credibility of the Individual's testimony. However, even assuming the testimony is true, it demonstrates a serious lack of judgment on the part of the Individual.

I believe that the Individual deeply regrets her use of the marijuana. However, I am not convinced that she fully appreciates the severity of the security concern raised by her use of the illegal substance. The Individual admitted that she was aware that both the DOE and her employer had policies in effect which prohibited the use of illegal substances. However, despite that awareness, the Individual knowingly chose to smoke the marijuana on three separate occasions over a nine-day span. In describing her marijuana use, the Individual stated that “it was only a one-time thing, and [she] had no plans to try it again or continue doing it.” This statement indicates that the Individual continued to minimize the seriousness of her actions. Furthermore, although she stated that she has adopted new methods of managing stress and has learned not to overexert herself in order to avoid aggravating her injury, the Individual also stated that she was not in an unusual amount of pain at the time she smoked marijuana. Therefore, her testimony regarding her new methods of pain management, while favorable, does not lessen the concern that she may smoke marijuana again in the future since her pain was apparently manageable during the marijuana use at issue in this case.

The Individual’s witnesses stated that they were surprised when they learned of the Individual’s marijuana use and stated their belief that it was an isolated incident. I believed that the witnesses testified candidly and honestly. While this testimony reflects favorably on the Individual, it does not outweigh the fact that the Individual used the marijuana in the first place or her apparent minimization of the seriousness of her actions. Although it is possible that the Individual will never use marijuana again in the future, based on the evidence in the record and the testimony presented at the hearing, I cannot conclude that the Individual has adequately resolved the security concern arising from her marijuana use.

The Individual’s marijuana use, in addition to being a security concern in and of itself, also calls into question whether the Individual is honest, reliable and trustworthy. The Individual admitted that she did not consider reporting her use of the marijuana to the security office despite having ample time to do so between the first and second time she used the substance. Furthermore, nothing in the record indicates that the Individual would have reported her marijuana use to security had she not tested positive for the substance in a random drug screen. When asked if she would have reported the use on the next reinvestigation of her clearance, the Individual could not state with certainty that she would. Rather, she stated that she would “like to think” that she would. The Individual’s witnesses testified generally that the Individual was honest, reliable and trustworthy and that her use of the marijuana was uncharacteristic. However, when asked if they believed the Individual would have eventually reported the drug use to the security office, one witness stated that he was unsure if the Individual would have reported the use, while another witness stated that she “probably” would have. Also, although the Individual’s spouse stated that he did not believe the Individual would use marijuana in the future, he added that he probably would not know if she smoked marijuana again because he “didn’t know the first time.” In addition, while the Individual’s acknowledgment of her lapse in judgment reflects favorably on her, her inability to answer with certainty whether she would report her marijuana use in future reinvestigations of her security clearance and her apparent minimization of the seriousness of her actions raise significant concerns as to whether the Individual can be relied on to obey security regulations in the future and to be candid with security regarding any violations of those regulations.

Based on the testimony at the hearing and the other evidence presented in this case, I do not believe that the Individual has successfully mitigated the security concerns raised by the derogatory information cited in the Notification Letter.

VI. CONCLUSION

Upon consideration of the record in this case, I find that there was evidence that raised a doubt regarding the Individual's eligibility for a security clearance. I also find that there is insufficient evidence in the record to fully resolve that doubt. Therefore, I cannot conclude that restoring the Individual's access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). Accordingly, I conclude that the Individual's access authorization should not be restored at this time.

Diane DeMoura
Hearing Officer
Office of Hearings and Appeals

Date: September 15, 2006